

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of ) MM Docket No. 96-123  
FAMILY BROADCASTING, INC. ) File No. BRH-951204YE  
For Renewal of License )  
for Station WSTX(FM) )  
Christiansted, Virgin Islands )

DOCKET FILE COPY ORIGINAL

To: The Commission

**MASS MEDIA BUREAU'S OPPOSITION TO  
MOTION FOR RECONSIDERATION AND TO VACATE RULING**

1. By Order, FCC 96M-213, released September 13, 1996, Administrative Law Judge Edward Luton dismissed the renewal application of Family Broadcasting, Inc. (Family) for failure to prosecute its application. Subsequently, Family mailed a "Motion for Reconsideration and to Vacate Ruling" to the Mass Media Bureau.<sup>1</sup> The Mass Media Bureau hereby opposes Family's motion.

Background

2. At the time the Commission issued the Order to Show Cause and Hearing Designation Order ("HDO"), DA 96-856, released May 30, 1996, designating Family's application for hearing, WSTX (FM) had been silent for approximately a year and a half (at

<sup>1</sup> Family's motion is not addressed to any particular office at the Commission. Bureau counsel provided copies of the motion to the Office of General Counsel. The Office of General Counsel provided copies to the Secretary's office on October 11, 1996.

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least since October 15, 1994). The HDO required that, in addition to a notice of appearance, Family submit an environmental impact statement and responses to Section II, Items 4 (Alien Ownership) and 5 (Character Qualifications) of FCC Form 303-S. These submissions were to be made to the presiding Administrative Law Judge (with a copy to the Assistant Chief, Audio Services Division) within thirty (30) days following the release of the HDO. The HDO further stated that the failure to provide the required information within the specified period of time would result in the applicant's dismissal for failure to prosecute. In directing Family to provide responses to Section II, Items 4 and 5, the HDO was unaware that Family had submitted this information to the Audio Services Division on March 26, 1996.

3. Although Family did submit a notice of appearance within the specified time period, it did not timely supply the Presiding Judge with the information called for by the HDO. Moreover, its notice of appearance was not properly filed with the Commission and did not include the provision that it would present evidence on the issues specified in the HDO. See Section 1.221(c) of the Commission's Rules. In light of Family's failure to comply with the requirements of the HDO and failure to properly file a notice of appearance, the Mass Media Bureau, at the prehearing conference held in this case on July 11, 1996, requested that the Presiding Judge dismiss Family's renewal application for failure to prosecute. At that conference, which was not attended by Family, the Presiding Judge granted the Bureau's motion to dismiss. In doing so he noted Family's failure to communicate with the Commission with the exception of filing "a pert little note" (referring to Family's notice of appearance). The Judge further noted that, despite the fact that its license was "on the

line," there had been "essentially no activity on the part of Family." Tr. 7-8.

4. Approximately 30 minutes following the close of the prehearing conference, the Presiding Judge received a visit from Family's representative, G. Luz James, Esq., who explained that flight delays had caused him to arrive late and therefore miss the prehearing conference. In light of the travel undertaken by Family's representative, the Presiding Judge concluded that Family did seek to return Station WSTX(FM) to the air. The Judge also concluded that Family's failures to comply with the requirements of the HDO were the result of James' unfamiliarity with the Commission's procedures. Thus, the Presiding Judge reversed his ruling made at the prehearing conference. See Order, FCC 96M-180, released July 16, 1996. This Order, however, conditioned Family's future participation in this proceeding on "the prompt submission of the information required in the [HDO] and the proper filing of a written notice of appearance." Id., at fn. 1.

5. Following reinstatement of Family's application, Family filed an "Amended Notice of Appearance" dated July 26, 1996. Nothing else, however, was received from Family. Accordingly, on August 1, 1996, the Mass Media Bureau filed a motion again requesting the Presiding Judge to dismiss Family's application for failure to prosecute. Family did not oppose or otherwise comment on the Bureau's motion. Consequently, by Order released September 13, 1996, the Presiding Judge granted the Bureau's motion and dismissed Family's application.

### Family's Motion

6. Family claims that the latest dismissal should be reversed because it had submitted the information called for by the HDO to the Commission prior to the issuance of the Order dismissing its application. Family also explains that it did not respond to the Bureau's motion to dismiss its application because it knew that it had submitted the information called for by the HDO to the FCC. In support of these contentions, Family supplies copies of two documents. The first is a letter dated March 22, 1996, addressed to the Federal Communications Commission, which supplies Family's answers to questions "inadvertently" not answered in its license renewal application. A search of the Commission's files discloses that Family's March 22, 1996, letter was received by the Audio Services Division on March 26, 1996. The letter was placed in the station's public file located in the Commission's reference room. By error, a copy of the letter was not placed in the station's license file. The second document is a letter to "Audio service - FM" dated July 12, 1996, providing environmental information. A search of the Commission's files has not revealed a copy of this letter. The HDO required that the information contained in the letter be submitted to the Presiding Judge with a copy to the Chief, Audio Services Division.

### Bureau's Analysis

7. In view of the foregoing, the Bureau opposes Family's motion on procedural grounds. Family has repeatedly failed to comply with the most elementary procedural requirements and to meet established deadlines. Although Family titled its pleading, "Motion for Reconsideration...", the pleading is not addressed to the Presiding Judge or any other

office at the Commission. Moreover, to the extent that it could be construed as seeking "reconsideration" by the Presiding Judge, it is well established that the Presiding Judge's jurisdiction ended on the day his ruling terminating the proceeding was issued. Carroll, Carroll & Rowland, 4 FCC Rcd 7149 (Rev. Bd. 1989). Thus, there is nothing for the Presiding Judge to reconsider. Moreover, the "Motion for Reconsideration" may be dismissed on the ground that it relies on matters that the Presiding Judge did not have an opportunity to pass on. See, Section 1.115(c) of the Commission's Rules which bars grant of a petition for reconsideration if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass. See also, S. Derrickson Moore, 47 RR2d 384, 386 (1980) and Garrett, Andrews & Letizia, 88 FCC 2nd 620, 623 (1981). Finally, to the extent that Family's pleading can be construed an appeal, it may be denied for failure to file a notice of intent to appeal. Section 1.302(b) of the Commission's Rules. See John Jones, Jr., 3 FCC Rcd 2446 (Rev. Bd.. 1988).

8. Moreover, and in any event, the Order correctly dismissed Family's application for failure to prosecute. Although letters containing the information called for by the HDO were submitted by Family to the Commission, neither of them were submitted to the Presiding Judge. Nor were they provided in response to the Presiding Judge's warning, contained in his order reversing his ruling dismissing Family's application for failure to prosecute, that Family's further participation in this proceeding was conditioned on its filing the information required in the HDO. Finally, they were not submitted in response to the Bureau's motion to dismiss Family's application for failure to supply this information. Indeed, as noted, Family

did not file any response to the Bureau's motion. The Presiding Judge therefore correctly and justifiably granted the Bureau's unopposed motion and dismissed Family's application for failure to prosecute renewal of its license. Even though the Bureau erred in the HDO by requiring Family to provide information it had already provided, this error was easily correctable by Family which had copies of its letters containing that information throughout the course of this proceeding. Instead, rather than providing the information to the Judge in a timely manner, Family allowed the Judge and the Bureau to proceed under the misunderstanding that it had not supplied the required information. Only now, after its application has been dismissed, does it offer the information it was required to provide the Presiding Judge within 30 days of the release of the HDO. The only explanation Family offers for its failure to supply the required information at an earlier date is that it knew it had previously submitted the information called for in the HDO to the FCC.

#### Conclusion

9. In sum, Family did not submit the information called for by the HDO to the

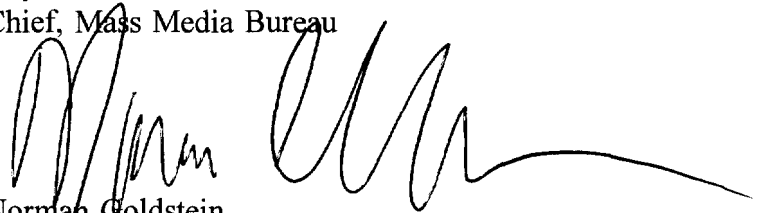
Presiding Judge. Nor did Family file any response to a motion to dismiss its application.

Under these circumstances, the Judge's dismissal of Family's application for failure to prosecute was justified, and Family has not provided any basis for reversal of that ruling.

Respectfully submitted,

Roy J. Stewart

Chief, Mass Media Bureau



Norman Goldstein

Chief, Complaints and

Political Programming Branch



Jacqueline E. Ellington

Attorney

Mass Media Bureau

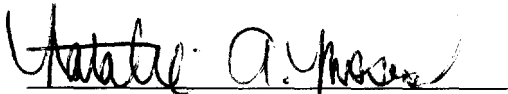
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October 28, 1996

CERTIFICATE OF SERVICE

Natalie Moses, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 28th day of October 1996, sent by regular United States mail, U.S. Government frank, a copy of the foregoing "**Mass Media Bureau's Opposition to Motion for Reconsideration and to Vacate Ruling**" to:

Family Broadcasting, Inc.  
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Natalie Moses